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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 310

EUGENE TRAMAGLINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 819-826) is reported at 197 F. 2d 928.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1952 (R. 826). On July 29, 1952, Mr. Justice Clark extended the time for filing a petition for writ of certiorari until August 29, 1952 (R. 827), and the petition for a writ of certiorari was filed on that date. The jurisdiction of

this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether there was adequate proof that the substance sold by petitioner was marihuana.

2. Whether petitioner was substantially prejudiced by testimony concerning prior dealings in narcotics, elicited in one instance by counsel for a co-defendant, and in another by his own counsel.

3. Whether petitioner was properly found to be a member of a conspiracy to deal in contraband narcotics on the basis of proof that he knowingly made illegal sales of large quantities of marihuana to the ring trading in narcotics.

STATUTES INVOLVED

18 U.S.C. 371 provides in part:

> If two or more persons conspire either to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

26 U.S.C. 2591(a) provides:

> It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be

issued in blank for that purpose by the Secretary.

STATEMENT

On April 27, 1951, an indictment charging petitioner and thirty-three other defendants with conspiring to receive, conceal, and unlawfully transfer cocaine, heroin, and marihuana, in violation of 21 U.S.C. 173 and 174, and 26 U.S.C. 2591(a), was filed in the District Court for the Southern District of New York (R. 8-15). In addition to the conspiracy charged in count one, the indictment in ten subsequent counts charged three of the defendants, including petitioner, with substantive violations of these sections. Petitioner was charged in counts two and three with transferring marihuana on two occasions in violation of 26 U.S.C. 2591(a).

Petitioner was found guilty as charged on all three counts (R. 787). He was sentenced to five years' imprisonment on each count, the sentences on the first two counts to be served concurrently, the sentence on count three to run consecutively to the sentences on counts one and two. Fines of $2,000 were imposed for each of the two substantive counts, making petitioner's total punishment 10 years in prison and $4,000 in fines. (R. 811-812.) On appeal by petitioner and another defendant, the Court of Appeals for the Second Circuit affirmed the judgment (R. 819-826). At the trial the following evidence was adduced:

In May 1950, the defendants Conde, and Ralph and Rafaele Alvarez, who were dealing in cocaine

and heroin formed a partnership with Zayas and his common-law wife, Ida Batista, with the understanding that Zayas would obtain supplies of marihuana (R. 65, 305). This group, the "partnership," comprised the central core of the conspiracy described in the indictment. From the time of its inception in May 1950, until the ring was broken up in or about November of that year, the partnership bought and resold cocaine, heroin, and marihuana. The other defendants participated either as suppliers at one end or as retailers, or "peddlers," at the other.

Pursuant to the arrangement made at the meeting when the partnership was created, Zayas undertook to purchase marihuana (R. 89-95). During most of the summer defendants Perez (R. 258), Mejia (R. 605), and Soto (R. 94-95) supplied Zayas and the partnership with marihuana. After September, however, the marihuana supply went short, and Zayas, unable to get marihuana from his customary sources, asked Alvarez if he (Alvarez) knew of any place where they could get more. Alvarez replied that he did, that petitioner had marihuana to sell. (R. 324.) Following this conversation, Alvarez met with petitioner and another defendant, Louis Rodriguez, at Louis' Bar & Grill, a favorite meeting place of the conspirators (R. 325, 428). At this meeting arrangements were completed for the purchase of three pounds of marihuana at $90 per pound, and Rodriguez went with petitioner to pick it up (R. 325, 326, 429). The next day petitioner came to the

apartment shared by Alvarez, Zayas, and Mrs. Batista to receive $160 in part payment for the marihuana. The money, which had been left there by Zayas in the custody of Mrs. Batista, was paid to petitioner by Alvarez. The balance of $110 was paid to petitioner in installments over the next few days. (R. 97, 326.)

A short time later, Rodriguez was sent to petitioner in Zayas' automobile with instructions to buy an additional five pounds of marihuana, but was given money enough for only three pounds. He returned with three pounds of marihuana, petitioner evidently being unwilling to do business with the partnership on other than a cash basis. (R. 98, 327, 430.)

Some of the marihuana supplied by petitioner eventually was sold by Alvarez to Walter Morris, a narcotics agent with the Treasury Department (R. 483, 682). It was later tested chemically and found to be marihuana (R. 490).

ARGUMENT

1. Petitioner attacks his conviction on the substantive counts on the ground that there was no adequate proof that the substance he sold to the partnership was in fact marihuana (Pet. 21). This contention is without merit. Chemical analysis is not required to justify a jury's finding that the substance in question is a contraband narcotic. "Even circumstantial evidence of the *corpus delicti*, if convincing, is sufficient." *United States* v. *Adelman*, 107 F. 2d 497, 498 (C.A. 2). In

the present case, experienced dealers in marihuana after having ample opportunity to examine the matter supplied by petitioner unhesitatingly paid him large sums of money. This fact alone would justify the jury's finding that petitioner had transferred marihuana as charged in counts two and three. In addition, the jury heard testimony by Mrs. Batista, Alvarez, and Rodriguez, all users of marihuana (R. 135, 335, 425), that petitioner had supplied marihuana. Cf. *Pennacchio* v. *United States*, 263 Fed. 66, holding that testimony of an habitual user that the substance in question was opium was enough to require submission to the jury of that question. Moreover, at least some of the marihuana supplied by petitioner[1] was tested by a Government chemist and found to be marihuana. (R. 490.) Plainly, the jury was warranted in finding that the substance supplied by petitioner was contraband marihuana.

2. Petitioner calls attention to alleged errors in the trial which he argues are a basis for reversing the judgment of conviction against him (Pet. 23 and 26). The alleged errors relate to testimony of Alvarez that he had obtained heroin from petitioner in 1947 (R. 349) and that at the time of his arrest he had in his possession marihuana obtained from petitioner before the period covered by the indictment (R. 424).

The testimony as to petitioner's heroin dealings

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[1] Alvarez testified that the marihuana, which was sold to federal narcotics agent Morris sometime in October 1950, had been obtained from petitioner a few days before (R. 682).

in 1947 was not elicited by the prosecution, but was brought out on cross-examination by the attorney for the defendant Rosario (R. 349). No objection was made at the time, and it was not until the court reconvened following the noon recess that motion for mistrial on the basis of this testimony was made. (R. 386.) The court refused to grant the motion but offered to direct the jury to disregard the testimony. This offer was declined by petitioner's counsel. (R. 388-389.) Clearly, under the circumstances petitioner was not entitled to a mistrial because of this minor incident. *United States* v. *Salli,* 115 F. 2d 292, 294 (C.A. 2); *United States* v. *Tannuzzo,* 174 F. 2d 177, 180 (C.A. 2), certiorari denied, 338 U.S. 815. As the Court of Appeals observed, other evidence of petitioner's guilt was so strong as to make it unbelievable that a jury would have acquitted in the absence of this testimony. See *Kotteakos* v. *United States,* 328 U.S. 750, 764.

The testimony relating to petitioner's sale of marihuana to Alvarez prior to May 1950, was the result of deliberate questioning by petitioner's counsel on re-cross-examination (R. 423-424). The line of questioning pursued by counsel was directed at getting Alvarez to contradict his previous statement to the effect that the marihuana found at the time of his arrest had been obtained from petitioner during the period of the conspiracy. (R. 422.) Petitioner does not deny that counsel succeeded in raising a question as to Alvarez' credibility. (Pet. 27.) The jury might have chosen to disbelieve all of Alvarez' damaging testi-

mony. It is unusual, to say the least, to claim it was error for the trial court to refuse to strike testimony laboriously elicited from the witness by petitioner's own counsel and more favorable to his case than not.

3. Petitioner contends (Pet. 18-21) that count one of the indictment alleged a single conspiracy, but the proof shows several different conspiracies, and that his conviction on that count is void. As we have shown, petitioner's conviction on counts two and three was properly upheld, and the sentence on the conspiracy count is to be served concurrently with that imposed on count two. Hence, there is no necessity for considering the question raised by this contention of petitioner. *Hirabayshi* v. *United States,* 320 U.S. 81, 85; *Pinkerton* v. *United States,* 328 U.S. 640, 642.

In any event, petitioner's contention is without merit. As the court below held, the evidence in this case established a single conspiracy, as charged in the indictment, and not, as petitioner claims (Pet. 18-20), several separate conspiracies. The core of the conspiracy was the central group organized for the purpose of unlawfully dealing in narcotics. A source of supply, as well as outlets for sale, was obviously essential to the carrying out of such a purpose. Hence, both those who supplied and those who disposed of the narcotics with knowledge of the purpose of the central group, were knowingly furthering the objects of the conspiracy, whether or not they knew each other or others in like category.

This case is thus governed, not by *Kotteakos* v. *United States,* 328 U.S. 750, but by the subsequent decision of this Court in *Blumenthal* v. *United States,* 332 U.S. 539, 558. Here, as in *Blumenthal,* each salesman, and by parity of reasoning, each knowing supplier, "must have known that others unknown to them were sharing in so large a project; * * *. By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common goal." See also *United States* v. *Bruno,* 105 F. 2d 921 (C.A. 2), reversed on other grounds, 308 U.S. 287.

In the instant case, the judge's charge to the jury very carefully stated that if any supplier named in count one had no knowledge of the purpose or objects of the conspiracy he would not be held to be a conspirator. (R. 769-770.) The jury thus found that petitioner had supplied marihuana with the requisite understanding that the conspiracy would be enabled to carry on its illicit traffic in marihuana if he made the drug available to them. The record contains ample evidence from which the jury could make this inference.[2] Peti-

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[2] While petitioner dealt primarily with defendant Alvarez, he was paid in part for the first sale at an apartment shared by Alvarez and two other members of the "partnership". The money was supplied by one of the other partners, and this was known to petitioner. In addition the quantity supplied by petitioner, six pounds within a few days, permitted the jury to infer that petitioner knew the marihuana was not for Alvarez' personal consumption but was to be resold. (R. 96-98, 324-327, 428-430.)

tioner thus knowingly joined with others in furthering the object of the conspiracy and was properly held liable as a conspirator.[3]

This finding by the jury is the answer to petitioner's claim (Pet. 9-18) that as a mere supplier he could not properly have been found guilty as a conspirator. *United States* v. *Falcone,* 311 U.S. 205, held no more than that the mere sale of an object which is used in an illegal venture does not make the seller an aider and abettor of the substantive crime. This Court has since made clear that the supplier of goods to an illegal venture may be held liable as a conspirator, even where each sale is in itself legal. *Direct Sales Co.* v. *United States,* 319 U.S. 703, 709. Here the success of the venture depended, not only on obtaining a source of supply, but on obtaining that supply by illegal means, i.e., without the order forms required by 26 U.S.C. 2591(a). One who supplies to a conspiratorial group large quantities of restricted goods in an illegal manner has obviously joined in and knowingly furthered the illegal venture. As the Court of Appeals for the Second Circuit said with respect to one Gross, who had supplied denatured alcohol to an illicit distilling conspiracy without filing the required reports:

> To report the sales would have stopped the business, both the business of Gross with the

[3] In *United States* v. *Koch,* 113 F. 2d 982 (C.A. 2), relied on by petitioner, the appellant had bought a quantity of cocaine on one occasion, but no showing had been made that he had known of the conspiracy and was by his purchase knowingly furthering its ends.

distillers, and presumably any operation of the still; and to suppress the sales was therefore to assist the distillers in their distilling. It is of course true that Gross' motive was only to get his profits from the sales, but his guilt does not turn upon his motive. In order to secure the business he had to abstain from disclosing the distiller's business, that is, himself to commit a crime and expose himself to punishment. That was to take an active hand in the distillers' business, and to have a stake in their venture in a sense that an indifferent seller has none. [*United States* v. *Pecoraro,* 115 F. 2d 245, 246, certiorari denied, 312 U.S. 685.]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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